

Louisiana Law Review

Volume 34 | Number 3

Employment Discrimination: A Title VII Symposium

Symposium: Louisiana's New Consumer Protection

Legislation

Spring 1974

Prisoners' Rights - Jailer's Duty of Protection

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Repository Citation

Jim Walsh, *Prisoners' Rights - Jailer's Duty of Protection*, 34 La. L. Rev. (1974)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol34/iss3/19>

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interest.⁶⁰ Furthermore, the legislature in its zeal to prevent abortion advertising of any kind has failed to protect the legitimate interests of the state in regulating the public health and general welfare.

Acts 72 and 76 appear to be unconstitutional. The state should reconsider its response to the Supreme Court's decisions. Irrespective of its distaste for the rulings, as evidenced by the numerous concurrent resolutions denouncing them, the legislature should concern itself with enacting those important, permissible state regulations which would protect the health of women exercising their fundamental rights under the constitution.

R. Patrick Vance

PRISONERS' RIGHTS—JAILER'S DUTY OF PROTECTION

Two recent decisions by the Louisiana supreme court, *Nedd v. State*¹ and *Parker v. State*,² point to a trend throughout the country to recognize the claims of prisoners seeking judicial enforcement of their rights.³ Nedd, an Angola inmate, was injured when attacked in his dormitory by the same prisoner who had been convicted of aggravated battery for an attack on Nedd some ten years earlier. Parker suffered injuries when he was attacked by an inmate who had previously threatened him. The issue in both cases was whether under the circumstances the state should be liable for damages in reparation for the injuries intentionally inflicted by other inmates. Though recovery was denied in both instances under the facts presented, the

60. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

1. 281 So. 2d 131 (La. 1973).

2. 282 So. 2d 483 (La. 1973).

3. A majority of states now permit inmates to institute civil suits. Even many of those states that still have civil death statutes forbidding suits in tort provide that imprisonment is a disability that interrupts the running of prescription. *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1019 (1970). In addition to the remedy discussed below, an injured prisoner may also have an action under the Civil Rights Act, 42 U.S.C. § 1983 (1970). Protection of inmates against assaults by other prisoners is included in the eighth amendment's prohibition against cruel and unusual punishment. *Penn v. Oliver*, 351 F. Supp. 1292 (E.D. Va. 1972). Though an isolated attack upon a prisoner, without special circumstances, is not seen as a constitutional deprivation, a prisoner who is injured by being needlessly exposed to an extra-hazardous condition may recover under the Civil Rights Act. *Roberts v. Williams*, 302 F. Supp. 972 (N.D. Miss. 1969). Similarly, if the general conditions at a prison are insufficient to prevent frequent assaults, the constitutional right of prisoners to be free from cruel and unusual punishment is violated. *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972).

possibility of future litigation⁴ invites a discussion of what affirmative duty, if any, is owed a prisoner by his custodian.

The proposition that one person is generally not under a duty to render aid to another or to undertake to protect another from harm⁵ has several well recognized exceptions. When a person through his conduct causes another to encounter a perilous situation, it is his responsibility to take reasonable steps to prevent harm to the other. If a person is in control of a dangerous environment to which another has become helplessly exposed, that person may be required to take steps to protect one who is so endangered. Hospitals,⁶ mental institutions⁷ and nursing homes⁸ are obvious examples of instances in which courts have seen fit to impose such affirmative duties. Common carriers,⁹ innkeepers¹⁰ and even storekeepers¹¹ are also required to afford reasonable aid and protection to those to whom they offer their services. Likewise a teacher must attempt to prevent any anticipated harm to his students.¹²

The same notions that have led courts to impose a duty of care in these instances are found in the situation of penal imprisonment. In addition, several unique aspects of imprisonment strongly emphasize the need to impose affirmative duties upon those charged with the custody of prisoners. Many persons with whom a prisoner must involuntarily associate are of conspicuously violent temperament.

4. The abrogation of the doctrine of governmental immunity by the court in *Board of Commissioners of the Port of New Orleans v. Splendour Shipping & Enterprises Co.*, 273 So. 2d 19 (La. 1973), should lead to an increase in the number of suits brought by prisoners against the state. Formerly legislative approval as provided for in Louisiana Constitution, article III, section 35 was required. Parker's suit was authorized by House Concurrent Resolution No. 215, 1970, and Nedd's by House Concurrent Resolution No. 8, 1968 Extra Session.

5. RESTATEMENT (SECOND) OF TORTS § 314 (1965).

6. *Sylvester v. Northwestern Hosp.*, 236 Minn. 384, 53 N.W.2d 17 (1952); *Hirsh v. State*, 9 App. Div. 2d 1006, 194 N.Y.S.2d 935 (1959).

7. *Gould v. State*, 181 Misc. 884, 46 N.Y.S.2d 313 (1944).

8. *Bezark v. Kostner Manor Inc.*, 29 Ill. App. 2d 106, 172 N.E.2d 424 (1961).

9. *Searcy v. Interurban Transp. Co.*, 189 La. 183, 179 So. 75 (1938); *Hughes v. Gregory Bus Lines*, 157 Miss. 374, 128 So. 96 (1930).

10. *Miller v. Derusa*, 77 So. 2d 748 (La. App. 1st Cir. 1955); *Priewe v. Bartz*, 249 Minn. 488, 83 N.W.2d 116 (1957); *Coca v. Arceo*, 71 N.M. 186, 376 P.2d 971 (1962).

11. RESTATEMENT (SECOND) OF TORTS § 314 A (1965).

12. *Eastman v. Williams*, 124 Vt. 445, 207 A.2d 146 (1965); *McLeod v. Grant County Sch. Dist.*, 42 Wash. 316, 255 P.2d 360 (1953). Here the court overruled a demurrer to an action on behalf of a twelve-year-old school girl raped by several of her classmates in the school gymnasium during noon recess. The court pointed out that the relationship between the school district and the pupil was not voluntary, that the child was compelled to attend school and the protective custody of the teachers is substituted for that of her parents.

Not only is a prisoner deprived of the comfort found in familiar, protective surroundings, but he is also completely denied that most effective means of protection, flight. In view of these considerations it is not surprising that, with few exceptions,¹³ courts have found affirmative duties for his aid and protection.¹⁴ The duty to take reasonable steps to protect a prisoner against an unreasonable risk of intentional harm by another prisoner was first recognized in Louisiana in *Honeycutt v. Bass*.¹⁵ There the court held that the allegation that a belligerently drunk fellow prisoner was allowed access to the plaintiff stated a cause of action against the sheriff in charge of the parish jail for the injuries the plaintiff received when attacked. Since the danger that one inmate will harm another is prevalent in almost all instances where men are imprisoned together, a determination that the risk to a prisoner of this type of harm is to be regarded as an unreasonable one must be made before special precautions can be required.¹⁶ It would seem that this determination cannot properly be made by a jailer who remains in ignorance of the situations under his supervision. Therefore it has generally been expected that some effort be made by a jailer to ascertain the extent of the risks to which his prisoners have been exposed.¹⁷

Where the confinement of prisoners together is only for a brief period immediately following their arrest, as when they are placed in a "drunk tank," it is usually not feasible for a jailer to investigate their propensity for violence.¹⁸ However, even in these circumstances, if the custodian has actual knowledge that a certain prisoner is violently insane¹⁹ or belligerently drunk,²⁰ this may be enough to induce the court to find that the custodian had a "reasonable ground to apprehend the danger"²¹ of injury and therefore to conclude that he should have taken steps to protect the other prisoners.

13. *Bush v. Babb*, 23 Ill. App. 2d 285, 162 N.E.2d 594 (1959); *Cocking v. Wade*, 87 Md. 529, 40 A. 104 (1898); *O'Hare v. Jones*, 161 Mass. 391, 37 N.E. 371 (1894).

14. RESTATEMENT (SECOND) OF TORTS § 320 (1965).

15. 187 So. 848 (La. App. 2d Cir. 1939).

16. *Mobley v. State*, 1 App. Div. 2d 731, 147 N.Y.S.2d 414 (1955).

17. *Cohen v. United States*, 252 F. Supp. 679 (N.D. Ga. 1966), *rev'd on other grounds*, 389 F.2d 689 (5th Cir. 1969); *Browning v. Graves*, 152 S.W.2d 515 (Tex. Ct. Civ. App. 1941). The court in *Shuff v. Zurich-American Ins. Co.*, 173 So. 2d 392 (La. App. 1st Cir. 1965), involving a drunken prisoner who fell from his bed, spoke of a sheriff's "affirmative duty to foresee the anticipated danger." *Id.* at 395.

18. *Middletent v. United States*, 311 F. Supp. 788 (D.S.D. 1970); *City of Lexington v. Greenhow*, 451 S.W.2d 424 (Ky. 1970).

19. *Dunn v. Swanson*, 217 N.C. 279, 7 S.E.2d 563 (1940); *Kusah v. McCorkle*, 100 Wash. 318, 170 P.1023 (1918).

20. *Honeycutt v. Bass*, 187 So. 848 (La. App. 2d Cir. 1939).

21. *Id.* at 851.

Where the period of imprisonment is a more extended one, it is appropriate for prison officials to take definite steps in an effort to obtain knowledge about those under their control.²² An inmate's criminal record, his mental history, and reports of his conduct while in prison could be included in a record maintained by prison officials.²³ The need for such a record to be used by prison authorities in classifying their prisoners and discovering potential troubles is obvious.²⁴ When properly maintained records point out possible dangers, this would compel officials to investigate further.²⁵ Observations by employees and guards would also afford notice to authorities of situations that may require their special attention.²⁶ If authorities are informed of complaints by inmates, this, on appropriate occasions, should lead them to attempt to find out whether there is a substantial basis for these expressions of fear.²⁷ Even though many complaints may turn out to be unfounded, some guarantee of genuineness is afforded them by the risk of arousing antagonism on the part of other inmates that the prisoner runs in approaching officials with such matters.

Even if the chance of injury from a recognized risk is known to prison officials, at what point does this chance reach such proportions to make special precautions necessary? Since violence is a not uncommon characteristic of prisoners, association with prisoners with records of violence is generally not enough to create an unreasonable

22. "When a person is under a duty to take precautions against a possible danger, there is usually an ancillary duty to use care to find out what precautions are needed; and for the purpose of the principal duty he is charged with all knowledge which he would have got by properly performing the ancillary duty." Terry, *Negligence*, 29 HARV. L. REV. 40, 48 (1915).

23. *Cohen v. United States*, 252 F. Supp. 679 (N.D. Ga. 1966), *rev'd on other grounds*, 389 F.2d 689 (5th Cir. 1967); *Bartlett v. Commonwealth*, 418 S.W.2d 225 (Ky. Ct. App. 1967). See THE AMERICAN PRISON ASS'N., SUGGESTED STANDARDS FOR A STATE CORRECTIONAL SYSTEM 21-22 (1946).

24. In *Nedd's* prison records there was no mention of the earlier attack by his assailant. While the majority did not discuss this, the dissent viewed this as a breach of the duty owed to *Nedd* by prison officials.

25. "He may, furthermore, be engaged in an activity, or stand in a relation to others, which imposes upon him an obligation to investigate and find out. . . ." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 160 (4th ed. 1971). On this point, the dissent in *Nedd* also was of the opinion that prison officials were negligent in failing to investigate the danger faced by the plaintiff.

26. *St. Julian v. State*, 98 So. 2d 284 (La. App. 1st Cir. 1957); *Glover v. Hazelwood*, 387 S.W.2d 600 (Ky. Ct. App. 1965).

27. In *Parker*, it was pointed out that the plaintiff's complaints led to a conference with prison officials and a search for weapons in his assailant's dormitory, even though prison officials testified to the frequency and often unsubstantiated nature of such complaints. See also *Webber v. Anderson*, 187 Neb. 9, 187 N.W.2d 290 (1971).

risk.²⁸ Special knowledge, however, that a prisoner is insane²⁹ or that a group has been organized to administer its own brand of "justice"³⁰ should require action by officials to avoid potential liability. Even short of this, when a grudge or special dislike of one prisoner for another is brought to officials' attention it may be necessary that preventive measures be taken.³¹ Intervention may also be appropriate where it becomes known that prisoners have weapons, even though it may be impossible to prevent the fabrication of instruments of attack.³²

Once it is concluded that the risk is one that demands some action, prison officials are faced with the determination of what action should be taken to prevent the possible harm. Isolation of each prisoner, though undoubtedly the best method of preventing all attacks,³³ may place such an extravagant demand on prison facilities that only the most extreme situation would justify it. Even if facilities were adequate, modern penological theories are opposed to the extensive use of isolation.³⁴ The acceptable practice, then, is to quarter all but the most dangerous inmates in groups.³⁵ In determining the membership of prisoner groups, special care to ensure the safety of inmates should be taken. For example, the sometimes common practice of housing homosexuals separately is one whose relationship to safety is uncertain. While the placement of homosexuals with other prisoners may create a disruptive influence or leave homosexuals open to victimization,³⁶ the rivalries and jealous disputes that arise in homosex-

28. *Fleishour v. United States*, 244 F. Supp. 762 (N.D. Ill. 1965).

29. *St. Julian v. State*, 98 So. 2d 284 (La. App. 1st Cir. 1957).

30. *People ex rel. Coover v. Gunther*, 101 Colo. 37, 94 P.2d 699 (1939); *Lamb v. Clark*, 282 Ky. 167, 138 S.W.2d 350 (1940); *Miller v. Owsley*, 422 S.W.2d 39 (Mo. 1967); *Taylor v. Slaughter*, 171 Okla. 152, 42 P.2d 235 (1935).

31. The plaintiff in *Upchurch v. State*, 51 Hawaii 150, 454 P.2d 112 (1969), was placed in a separate corridor because his life had been threatened. In both of the principal cases it appears that the attacks were the result of animosity towards the plaintiff.

32. *Fleishour v. United States*, 244 F. Supp. 762 (N.D. Ill. 1965) (attack with fire extinguisher, attack with a bible also mentioned); *Flaherty v. State*, 296 N.Y. 342, 73 N.E.2d 543 (1947) (acid from fire extinguisher used); *Dunn v. Swanson*, 217 N.C. 279, 7 S.E.2d 563 (1940) (attack with table leg).

33. Even isolation may not prevent all attacks, as the facts in *Upchurch v. State*, 51 Hawaii 150, 454 P.2d 112 (1969), and *Burdich v. State*, 206 Misc. 839, 135 N.Y.S.2d 548 (1954) show.

34. E. SUTHERLAND & D. CRESSEY, *CRIMINOLOGY* 522-24 (8th ed. 1970).

35. *Fleishour v. United States*, 244 F. Supp. 762 (N.D. Ill. 1965).

36. "Prisoners afflicted with homosexual tendencies are a constant source of difficulty for prison officials. Their presence . . . is a disruptive influence, to say the least." *Parker v. State*, 282 So. 2d 483, 487 (La. 1973).

ual groups are often the source of serious dangers.³⁷ When authorities are aware of tensions within a group that are likely to erupt into violence, the reasonable course of action may be removal of one of the antagonists from the group by reassignment to another part of the prison population or by isolation from all other prisoners. Whether the situation exhibits such a potentiality for harm as to require the reassignment of either the possible victim or assailant, rather than using a less burdensome measure, must be considered by prison officials.³⁸

Several of the easier but frequently less effective measures that may be employed instead of isolation or reassignment deserve mention. Supervision over potentially dangerous situations can be increased, although this will usually only forestall and not prevent the threatened harm. There may be a resort to searches to prevent the acquisition and retention of weapons. Here again, however, the removal of every object that may be used to inflict serious harm cannot always be accomplished.³⁹ Efforts at reconciliation between feuding prisoners can be attempted,⁴⁰ or belligerent prisoners can be informed that disciplinary measures will promptly follow any show of violence. However, the relative effectiveness of these various measures when the threat of assault is immediate must be considered in a determination of which precautionary steps should be taken. Weighing the immediacy of the danger against the effectiveness of the different precautionary measures and the relative burdens they place upon penitentiary staff and facilities may lead to the conclusion that isolation or separation that denies access to the potential victim is the only reasonable course of action.

37. In *Parker*, both the plaintiff and his attacker were quartered in Camp H, the Angola camp for homosexuals. The apparent motive for the attack was jealousy provoked by Parker's finding a new paramour. See *Adams v. State*, 247 So. 2d 149 (La. App. 1st Cir. 1971) (homosexual dispute).

38. "The administrative decision against isolation was based upon a satisfactory interview with the prisoners and a fruitless search for weapons. Although by hindsight we now know that the decision was wrong, hindsight is not the test. To the contrary, the decision must be tested by the information, alternative courses of action, and circumstances existing at that time." *Parker v. State*, 282 So. 2d 483, 487 (La. 1973). See also *Nedd v. State*, 281 So. 2d 131 (La. 1973) (dissenting opinion); *Webber v. Anderson*, 187 Neb. 9, 187 N.W.2d 290 (1971).

39. "The record reflects that the weapon problem is common to all penal institutions. Despite all reasonable precautions, the acquisition of such weapons cannot be completely prevented." *Parker v. State*, 282 So. 2d 483, 487 (La. 1973). Cf. note 32 *supra*.

40. A conference between Parker and his attacker was held by prison officials, but its success was obviously superficial. It is doubtful that many prisons are staffed adequately enough to make this type of measure effective.

Since many of the penal institutions throughout the country are notoriously inadequate, both in terms of staff and facilities, it is often the case that a prisoner's injuries are not the result of fault on the part of prison officials but are due instead to the inadequacies of the institution.⁴¹ The prisoner whose injury is not caused by the individual shortcomings of those who have immediate control over him, but instead by the failure of the state to provide its penal institutions with sufficient resources, usually has no claim against the state.⁴² This position, not without merit, reflects the judicial hesitancy to second-guess political decisions. The determination as to how the limited funds of the state are to be allocated is considered a legislative function, outside both the authority and the competence of the judiciary. On the other hand, arguments have been advanced by some that the state, which has placed its prisoners in their perilous situation and deprived them of their means of self-protection, should to some degree be responsible for their safety.⁴³ Although this is presently a minority position, it indicates a growing concern for the rights of prisoners and the increased possibility of judicial enforcement of these rights.

Jim Walsh

IN PERSONAM JURISDICTION OVER NONRESIDENT BUYERS:
LOUISIANA LENGTHENS ITS LONG-ARM

Plaintiff, a Louisiana corporation, which contracted with defendant to furnish engineering services, sought to assert personal juris-

41. "Tragically, plaintiff's injury was the product of an environment in which violent, disturbed, and sexually abnormal men are crowded into a single prison unit under conditions that are far less than ideal. As the record shows no degree of caution can altogether prevent such occurrences." *State v. Parker*, 282 So. 2d 483, 487 (La. 1973). "We agree, as argued by plaintiff before us, that Hawaii State Prison is very antiquated and inadequate. . . ." *Upchurch v. State*, 51 Hawaii 150, 152, 454 P.2d 112, 114 (1969).

42. *Upchurch v. State*, 51 Hawaii 150, 454 P.2d 112 (1969); *City of Lexington v. Greenhow*, 451 S.W.2d 424 (Ky. Ct. App. 1970); *Parker v. State*, 282 So.2d 483 (La. 1973).

43. "The state's failure to appropriate adequate monies for the state's institutions to perform their custodial function should not, in this last part of the Twentieth Century, immunize the state from liability to an inmate who is injured through the state's lack of reasonable care in furnishing reasonable safeguards for his physical security while he is in the state's custody and unable to fend for himself." *Nedd v. State*, 281 So. 2d 131, 136 (La. 1973) (dissenting opinion). A similar opinion is expressed in the dissenting opinion in *Parker v. State*, 282 So. 2d 483, 488 (La. 1973).